in what manner it was parked, but presumably it was parked parallel to the gate leading to the store compound. The police witness's view would be obstructed by this car as anybody coming out of the gate and intending to put anything in the car could do so from the side nearer to the gate. Therefore, when the police witness said he saw the appellant produce some copper rings from his pocket and put them under the rear seat the police witness was telling the Court what he thought he had seen and not what he had actually seen. In order to put something under the rear seat, as the police witness put it, the rear seat had first to be moved. The photograph Exhibit P.5B shows clearly that the rear seat has to be moved before any object can be put "under the rear seat." Yet the police witness did not say at all in his evidence he had seen the appellant remove the rear seat. The learned President, in my opinion, failed to direct his mind on the question as to whether the police witness could have an unobstructed view of the incident.

In my opinion, the learned President wrongly admitted the police report (Exhibit P.4). This report was made by the police witness at the end of his investigation. This report mentioned among other things that the appellant tried to bribe the police witness and the learned President had this in mind when he said in his judgment that he had ignored the statement of the police witness which came out in his cross-examination that appellant had attempted to bribe him (the police witness). The learned President obviously failed to direct his mind to the provisions of section 113 of the Criminal Procedure Code.

The learned President in his grounds of judgment stated that he did not accept the accused's defence, but did not give his reasons for rejecting the defence except by saying that he believed the evidence of the police witness. In my opinion, the learned President ought to show in his grounds of judgment that the defence had been carefully considered and his reasons for rejecting it. This, in my opinion, has not been done.

I therefore reverse the finding and sentence of the learned President and order the appellant be retried before another President.

Retrial ordered.

LOW SENG WAH v. PUBLIC PROSECUTOR

[A. Cr. J. (Neal J.) November 4, 1961]

[Ipoh — Criminal Appeal No. 58 of 1961]

Bribery and Corruption — Prevention of Corruption Ordinance, 1950, s.3 — Police corporal receiving moneys for showing favour to principal's affairs — Omission of essential ingredients in charge — Whether the accused was misled — Duplicity of charge — Whether money received was an inducement or reward — "Chance witness" — Meaning of.

Criminal Law and Procedure — Charge — Criminal Procedure Code (Cap. 6), ss.156, 256, 321 and 422.

The appellant, a corporal with the Federation Police, was charged and convicted under section 3(a) of the Prevention of Corruption Ordinance, 1950, for corruptly accepting $30 from one LYK by promising to assist him in settling a samsu case which was still under investigation. On appeal, it was argued *inter alia*, that (i) the charge disclosed no offence known to the law because of the omission of essential ingredients of the charge; (ii) the learned President erred in law as neither the charge nor the evidence showed that the appellant received money as a reward in relation to his principal's affairs; (iii) that the learned President erred in not realising that a particular witness was a "chance witness" and that his evidence should be viewed with caution.

Held: (1) even if there was an omission of an essential ingredient of the charge the appellant was not misled and if the charge can be said to be bad for duplicity there has been no miscarriage of justice;

(2) there was ample evidence that the money was received as an inducement for showing favour in relation to the appellant's principal's affairs;

(3) a "chance witness" is one who by chance overhears an admission of a person deceased at the time of hearing. The third prosecution witness was not a "chance witness" and there was no reason to treat this witness any different from any other witness.

Cases referred to:—

(1) *Public Prosecutor* v. *Syed Bakri*, [1955] M.L.J. xvii.

(2) *Abdul Salam* v. *Public Prosecutor*, [1955] M.L.J. 116 at p. 117.

(3) *Public Prosecutor* v. *Leong Yoon Meow*, [1953] M.L.J. xxxv.

(4) *Stewart and Harris*, 44 Cr. App. R. 29.

(5) *Lee Ship* v. *Public Prosecutor*, [1961] M.L.J. 143.

(6) *Mohamed Ghouse* v. *The King*, 11 S.S.L.R. 31.

(7) *Ong Joo Chin* v. *R.*, [1946] M.L.J. 1.

(8) *Letchumy* v. *Public Prosecutor*, 1 M.C. 129.

(9) *John Smith*, 44 Cr. App. R. 55.

(10) *Ismail Ahmad Peepadi* v. *Momin Bibi & Ors.*, A.I.R. 1941 P.C. 11 at p. 13.

CRIMINAL APPEAL.

David Marshall for the appellant.

Abdul Hamid bin Omar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Neal J.: The appellant was convicted by the President of the Sessions Court at Parit Buntar on the following charge:

"That you, on 12.6.60 at about 12 noon at No. 6523 Lorong Pekan Minggu, Sungei Gedong, Semanggol, Bagan Serai, in the State of Perak, being an agent employed in the Royal Federation of Malaya Police, to wit, Corporal 3396, did corruptly accept a sum of $30 in cash from one Lee Yew Khiam (f) for yourself for showing favour, in relation to your principal's affairs, namely, by promising to assist the said Lee Yew Khiam in settling a samsu case which is still under investigation vide Bagan Serai Report No. 547/60, and that you thereby committed an offence punishable under section 3(a) of the Prevention of Corruption Ordinance, 1950. (No. 5/50)."

Mr. Marshall who appeared on behalf of the appellant argued the following seven grounds of appeal:

"(1) The charge disclosed no offence known to the law;

(2) The learned President erred in law—

In convicting the appellant on a charge in respect of which the principal ingredient was not proved, namely,

that the acceptance of the sum of $30 was for showing favour in relation to his principal's affairs — neither the charge nor the evidence substantiated the averment that the appellant received money as a reward for showing favour in relation to his principal's affairs;

(3) In questioning the accused without noting the exact nature of the questions and the replies;

(4) In failing to recognise that P.W. 2 (Chor Bak Khia) was an active accomplice not covered by the provisions of section 13(3) of the Prevention of Corruption Ordinance;

(5) In failing to recognise that P.W. 3 (Teoh Chin Wong) was a chance witness and his evidence should be viewed with caution;

(6) In failing to give adequate consideration to the explanation of the accused and in failing to give any consideration to the evidence of the two defence witnesses (Tong Eng Lee and Khoo Teik Eng);

(7) In giving undue weight to an irrelevant aspect of the evidence, being the evidence as to the incident of the appellant drawing his revolver at the time of his arrest by plain clothes officers."

There was an additional ground of appeal based upon the absence of a copy of the sanction in the appeal record. Mr. Marshall intimated that he abandoned that ground of appeal because he was satisfied not only that was there a sanction in existence but that it had been produced although not included in the record.

At the conclusion of the argument I reserved my decision to enable me to give further consideration to the first ground of appeal argued before me, namely, that the charge disclosed no offence known to the law. Mr. Marshall relied upon the rule of construction as to materiality and the necessity for the inclusion of all essentials in a charge and referred to the statement in the 4th Edition of *Maxwell on Interpretation of Statutes* at page 265, and three Malayan decisions, namely, *Public Prosecutor* v. *Syed Bakri* [1], *Abdul Salam* v. *Public Prosecutor* [2], *Public Prosecutor* v. *Leong Yoon Meow* [3], and the recent English case of *Stewart and Harris* [4], where the word, 'knowingly,' had been omitted from the charge. The Deputy Public Prosecutor in dealing with this ground of appeal relied upon sections 156 and 422 of the Criminal Procedure Code. As regards the English authority, it must be remembered that the English criminal law contains no provision equivalent to sections 156 and 321 of the Federation Criminal Procedure Code and therefore the English authorities are of little assistance to this Court. As regards the decision of Thomson J., as he then was, in *Public Prosecutor* v. *Syed Bakri* [1] it was in my opinion necessary to refer to the records of this Court in Criminal Revision No. 3 of 1955 in order to ascertain the set of circumstances to which his Lordship's words had reference. The records show that on 26th January, 1955, the then Deputy Public Prosecutor, Perak, drew the attention of the Court in a memorandum to the fact that the punishment awarded was unlawful. On receipt of the records his Lordship Mr. Justice Thomson made the following minute: "It seems to me that the charge here is so bad that the conviction cannot stand. But does the D.P.P. wish to be heard in support of the conviction?" The then Deputy Public Prosecutor replied by memorandum as follows: "With respect I agree with his Lordship's opinion and I do not wish to be heard. D.P.P., Federation of Malaya." In addition it is obvious that his Lordship was dealing with a case where an accused had been charged with an alleged offence of being found to have made an alteration of an entry in an identity card thereby committing an offence against regulation 18(2)(a) of the Emergency Regulations, 1951. The relevant regulation according to his Lordship then read:

"18 (2). Any person who —

(a) ..... knowingly has in his possession an identity card containing any false entry, or unauthorised alteration .....

shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding ten years."

His Lordship in his order of revision, after pointing out the omission of two essential ingredients, stated that the accused in the Court below had pleaded guilty and been convicted on that charge. His Lordship did not expressly consider section 156 of the Criminal Procedure Code nor did he have to in view of the concession in the minute of the Deputy Public Prosecutor which must be taken to include an admission that the accused in the Court below had been misled and in fact in an appeal in respect of a conviction based on a plea of guilty to a charge which omits essential ingredients it would almost be impossible for the Deputy Public Prosecutor to successfully contend that the accused had not been misled.

With reference to the earlier decision in *Public Prosecutor* v. *Leong Yoon Meow* [3] in Criminal Revision No. 17 of 1953, I similarly found it necessary to refer to the records of the Court. The respondent in that criminal revision had been convicted on his plea of guilty in the Magistrate's Court at Ipoh of an offence under section 17(f)(5) with breaking the conditions of his restricted residence. Subsequently, the police became aware of the fact that there was in fact no restricted residence order against the accused and quite properly then informed the Magistrate who referred the matter to his Lordship for criminal revision. His Lordship in his order of revision part of which is quoted in [1953] M.L.J. at page xxxv was referring solely to the fact that this error would not have occurred had charges been properly drawn and before prosecution the evidence checked to ascertain that the evidence available established each and everyone of the essential ingredients of the offence.

As regards the decision in *Abdul Salam* v. *Public Prosecutor* [2] it is in my opinion of little assistance in the matter before me because his Lordship Tomson J., as he then was, is doing no more than drawing attention with emphasis to what he had said in the two cases to which I have referred on the proper carrying out of the duties of the prosecution. At page 117 he said. "I do not propose to discuss the wording of that charge except to observe that had the prosecuting officer and the Magistrate given heed to the advice I have frequently given in the past

to make some attempt to frame charges in accordance with the wording of the statutory provision which is alleged to have been contravened they would have realised that the case presented difficulties of which they seem to have been completely oblivious." With his Lordship's remarks on the advisability of properly framing charges, I completely agree. I have on occasions myself emphasised the advisability of so doing but it is to be emphasised, in my opinion, that his Lordship was not nor has any other Judge to my knowledge stated that it is a necessity to follow when drafting a charge the exact wording of the section concerning the offence. Authority for this may be found in the recent Court of Appeal judgment in *Lee Ship* v. *Public Prosecutor* [5]. It seems to me that all that has been said is that if the prosecution elect to depart from the wording of the offence as set out by the legislature they create difficulties for themselves which may not be cured even with the assistance of the provisions of the Criminal Procedure Code and, in particular, section 156 thereof. I have on many occasions said that my powers on appeal to interfere with the decisions of the subordinate courts are limited by the mandatory provisions of section 321 of the Criminal Procedure Code and, in this connection, I approved of and follow the decisions in *Mohamed Ghouse* v. *The King* [6] and *Ong Joo Chin* v. *Rex* [7], a decision of Worley J., as he then was, given on the 11th September, 1941, and I find myself unable to agree with the judgment of Burton J. in *Letchumy* v. *Public Prosecutor* [8] based as it is on certain Indian authorities which, in my opinion, have no application in this country in view of the fact that there is in the Indian Criminal Procedure Code no counterpart to the Federation section 321 of the Criminal Procedure Code. Section 321 of the Criminal Procedure Code prohibits my interference with decisions of the subordinate courts unless I am satisfied that the judgment sentence or order was either wrong in law or against the weight of evidence. This in its application to this particular ground of appeal must mean that the judgment or finding of the Court below was wrong in law. However, I have grave doubts which I find it unnecessary to resolve in this case as to whether there would be such an error in law in the judgment or decision if the finding of the Court below had read guilty of an offence against section 3(a) of the Prevention of Corruption Ordinance. I said that I find it unnecessary to resolve the doubt I felt on the question of the judgment being wrong in law because in this particular appeal the record is clear that the finding of the subordinate court was guilty as charged.

I have made reference to the question of whether or not the accused in the Court below has been misled by the omission of an essential ingredient. Section 156 of the Criminal Procedure Code which again is in mandatory terms reads: "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission." It will be noted so far as this appeal is concerned that reference is made to an error in stating the offence and further an omission to state the offence. Illustration (a) further clarifies the meaning of section 156 if any clarification be required, and makes it clear to me that the omission of an essential ingredient in the charge upon which an accused has been convicted after full trial would not in view of section 321 of the Criminal Procedure Code entitle me to set aside the conviction unless the accused has been misled. It seems to me, therefore, that to succeed on this appeal the appellant must establish two things. Firstly, that an essential ingredient of the offence was omitted from the charge and secondly, he was misled by that omission. The section upon which the charge is based reads:

> "3 (a). If any agent corruptly accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any money, gift or other consideration as an inducement or reward for doing or forbearing to do, or for having after the commencement of this Ordinance done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ..... he shall be guilty of an offence ....."

It will be noted that in the charge the words, "as an inducement," or alternatively, "reward," have been omitted immediately preceding the words, "for showing favour .....". As to whether these words are essential to an offence against the sub-section depends, in my opinion, on the meaning to be given to the words, "corruptly accept." So far as I can ascertain they have not been the subject of judicial construction either here or in the United Kingdom where the same words were used as early as the year 1889. I have been forced therefore to rely entirely upon the dictionary meaning of the word, "corruptly," in order to find out what the word, "corruptly," means. The *Concise Oxford Dictionary* (I have since checked with the meanings given in the *Shorter Oxford*) gives the following meanings of the word: "corrupt," rotten; depraved, wicked; influenced by bribery. For myself, I have always been of the opinion that the words, "corruptly accepts," or "corrupt acceptance," of money necessarily implied an acceptance as an influence and I think the legislature in the relevant provisions of the Penal Code have made that clear by providing for an offence in respect of accepting of a valuable thing without consideration. In my opinion, the legislature by adding the words referring to, "inducement," or "reward," were doing no more than making it clear that the words, "corruptly accepts," included not only the element of inducement but also reward where the favour had been done before the money was paid and that the omission of one or other of these words is not an essential part of the charge. Further it seems to me that applying the dictionary meaning to the words actually used in the charge the element of inducement is already

included in the allegation in the charge, "did corruptly accept." After preparation of this judgment I noticed that the Court of Appeal in the United Kingdom had considered the meaning of the word, "corruptly," in the case of *John Smith* [9], and the following expressions of opinion support the view I have taken. *Per* trial Judge in his summing up reported at page 59, "In other words, if I offer you a reward in order that you should do something which may help me, I am doing it corruptly, if I am offering and hoping that the offer *will induce you to act* in the way in which I want you to act." And *per* Lord Parker C.J., in the judgment of the Court at page 60, "The sole question, for the purposes of this case, as it seems to the Court, is whether the word 'corruptly' in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom it is made so as to make him enter into what I may call a corrupt bargain ....." (The underlining is mine). If I am wrong in this latter opinion then at most in view of the opinion I have formed on the meaning of section 3 the most it can amount to is duplicity in the charge which the appellant had to meet and the position would appear to be cured by section 422 of the Criminal Procedure Code. On a perusal of the record I am forced to the conclusion that even if the omission of one or other of these phrases was the omission of an essential ingredient of the charge the appellant was not misled, and if the charge can be said to have been bad for duplicity there has been no miscarriage of justice. I have said if the charge can be said to be bad for duplicity because in my opinion reading the charge as a whole and in particular the details it is made clear that the prosecution's allegation is that it was an inducement and not a reward. To me an inducement is something that leads one to do something and a reward is a return or recompense for something done.

As to the second ground of appeal argued before me, on a perusal of the evidence I am satisfied that there was ample evidence, if the prosecution case was believed, that the acceptance of the sum of $30 was for showing favour in relation to the appellant's principal's affairs. As for the averment that there was no evidence that it was received as a reward, that is to say, as a payment for something already done as opposed to an inducement to do something in future, it is clear in my opinion from the charge that the allegation is not that the money was received as a reward but that it was received as an inducement, and this allegation if the prosecution evidence is accepted is clearly established by the evidence.

As regards the third ground of appeal argued before me that the President of the Sessions Court was wrong in law in questioning the accused without noting the exact nature of the questions and the replies, Mr. Marshall relied upon section 256 of the Criminal Procedure Code and, in particular, sub-section (viii) thereof. During the course of his argument I enquired from counsel how he reconciled the powers given the Court by section 165 of the Evidence Ordinance with his submission. In reply Mr. Marshall contended that section 165 of the Evidence Ordinance was a general provision and was overruled by the provisions of sub-section (viii) of section 256 of the Criminal Procedure Code. I intimated at that stage that I saw no conflict between the two provisions; that section 165 of the Evidence Ordinance applied to any witness and I saw no reason to limit the term, "witness," so as to exclude an accused person whereas in my opinion section 256 referring as it does to its use for the purpose of enabling the accused to explain etcetera had clear reference to the case of an accused who elected to make a statement from the dock or not to give any evidence. I drew some support from the form in which the Courts of this country have for years administered the three alternatives to an accused at the close of the prosecution case. Mr. Marshall did not seek at that stage to draw the Court's attention to any point of conflict between the two sections but during the course of the Deputy Public Prosecutor's reply to the argument on this ground Mr. Marshall interposed to state that in view of my remarks during the hearing of this appeal this ground was no longer urged on behalf of the appellant.

With regard to ground five Mr. Marshall relied upon a sentence used by Sir George Rankin in *Ismail Ahmad Peepadi* v. *Momin Bibi and others* [10] at page 13 where Sir George Rankin in delivering the judgment of the Privy Council said, "Though the 'chance witness' is not necessarily a false witness, it is proverbially rash to rely upon such evidence." Standing alone that sentence appears to go further than can be justified and it is clear that unless the words, "chance witness," are given a special meaning it would be rash to rely upon the evidence of a considerable number of witnesses. Sir George Rankin, in my opinion, made it clear not only by his use of quotation marks that the phrase is used in a special sense but also made it clear in the preceding sentence what he meant by the use of the words, "chance witness," when he said, "By stating that he went with Ahmad Peepadi and Jeewa by special arrangement this witness does not remove himself from the very well known category of *'chance witness,' whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation.*" Sir George Rankin apparently was drawing on his experience in the Courts in India concerning witnesses who by chance overheard an admission by a person deceased at time of hearing. He was not, in my opinion, referring to a witness such as the third prosecution witness who happened to be in the house at the time the money was paid to the appellant. I see no reason to treat this witness any different from any other witness.

As regards the fourth ground of appeal argued before me even if the second prosecution witness were an accomplice and it was not on the evidence on the record established or even if that witness by his actions had brought himself within the class of people whom these Courts treat as accomplices there is nothing on the record to show that the Court below had failed to recognise that witness as an accomplice. The only thing that can be said is that the Court below did not refer to it in its grounds of judgment. For the appeal to succeed on this ground the Court would have to assume as against the Court below that the Court had not recognised it and had not warned itself as required by law. For myself, I doubt whether an appellate Court should make such an assumption especially where there is nothing upon which such an assumption could be based. However, it appears to me that having regard to the mandatory terms of section 321 of the Criminal Procedure Code this would not be a successful ground of appeal where there was as in this case in the evidence of the first and third prosecution witnesses ample corroboration.

As regards the sixth ground of appeal argued before me there is nothing on the record from which this Court would be justified in assuming the Court below had failed to give adequate consideration to the evidence of the two particular defence witnesses. The most that can be said is that the President has not referred to the witnesses by name or in detail to their evidence but has contented himself with the statement that he failed to agree with the story put up by the defence which has not cast any doubt on the prosecution story. Again, as I interpret section 321 of the Criminal Procedure Code the appellant has to satisfy me that the decision was against the weight of evidence, and it is therefore to a large extent immaterial what the Court below may or may not have considered or may or may not have referred to in its grounds of judgment as being considered.

As regards the seventh ground of appeal argued before me it is clear on the view that I take of section 321 of the Criminal Procedure Code that this is also to a large extent irrelevant if the appellant is unable to satisfy the Court pursuant to section 321 of the Criminal Procedure Code that giving due and proper weight to the evidence referred to the decision is against the weight of evidence. It was for this reason that I suggested to Mr. Marshall that an additional ground of appeal should be added that the decision was against the weight of evidence. On this ground I have perused the record and so far from being satisfied on the evidence the verdict was against the weight of evidence I have reached the conclusion that on the unshaken evidence for the prosecution the Court below could have reached no other conclusion than the guilt of the appellant, and that the eivdence adduced on behalf of the appellant as to a loan could not be accepted as evidence that might reasonably be true.

The appeal is therefore dismissed.

Appeal dismissed.

ALAGAPPA CHETTIAR v. COLISEUM CAFE

[C.A. (Thomson C.J., Hill and Good JJ.A.)
August 18 and December 13, 1961]

[K.L. — F.M. Civil Appeal No. 11 of 1961]

Landlord and Tenant — Claim for possession — Preliminary point as to whether value of subject matter is below $500 — Whether unincorporated body capable of assuming rights and obligations arising from relationship of landlord and tenant — Control of Rent Ordinance, 1956, s.12(1) — Courts Ordinance, 1948, s.37(1).

Partnership — Partners constantly changing — Whether capable of entering into relationship of landlord and tenant — Contracts (Malay States) Ordinance, 1950, s.206(g) and (j).

The appellant is the owner of premises known as No. 102 Batu Road and the respondent is a firm of partners carrying on business of a cafe and hotel in Nos. 98, 100 and 102 Batu Road. The present appellant brought an action in the Sessions Court for recovery of possession of his premises No. 102 and for mesne profits. The learned President was of the opinion that the defendant firm though registered as a business had not the power to become tenants as so constituted and he gave judgment for the appellant. The respondent appealed to the High Court and Hashim J. allowed the appeal. From this decision the appellant appealed to the Court of Appeal. A preliminary point was raised by counsel for the respondent that as "the amount or value of the subject matter at the trial is less than five hundred dollars" there was no right of appeal unless leave was obtained from the High Court or from the Court of Appeal. The only other point raised was whether the respondent being an unincorporated body having no legal personality was capable of assuming the rights and obligations of the relationship of landlord and tenant.

Held: (1) the mesne profits claimed must be taken into account in determining whether the amount or value of the subject matter was more or less than $500;

(2) in this case the respondent had not made out the allegation on which his preliminary objection rested;

(3) the letting in this case created the relationship of landlord and tenant between the previous landlord on the one hand and the partners on the other, and though there had been a change of partners over the years, members of each new partnership arising from each change by virtue of section 206(g) and (j) of the Contracts (Malay States) Ordinance, 1950, had continued *de jure* to assume obligations and enjoy benefits of the tenancy. This followed from the fact that when the tenancy agreement was made no reliance was placed upon the "personnel of the partners."

Cases referred to:—

(1) *Bramwell* v. *Bramwell*, [1942] 1 K.B. 370.
(2) *Mohideen Hadjiar* v. *Pitchey*, [1893] A.C. 193.
(3) *Bank of New South Wales* v. *William Owston* (1878-9), 4 App. Cas. 270, 274.
(4) *In re Sawers, Ex parte Blain* (1879), 12 Ch.D. 522, 533.
(5) *Sadler* v. *Whiteman*, [1910] 1 K.B. 868.